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Huntington, NY 11743

EXAMINER

HWU, DAVIS D

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PAPER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte VALERY CHUPRIN

Appeal 2009-009838
Application 10/763,909
Technology Center 3700

Before STEVEN D.A. McCARTHY, STEFAN STAICOVICI, and
KEN B. BARRETT, *Administrative Patent Judges*.

BARRETT, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Valery Chuprin (Appellant) seeks our review under 35 U.S.C. § 134 of the final rejection of claims 1, 2, 4, 7-10, 14, and 15. Claims 3, 5, 6, and 11-13 have been canceled. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM-IN-PART and ENTER A NEW GROUND OF REJECTION PURSUANT TO OUR AUTHORITY UNDER 37 C.F.R. § 41.50(b).

THE INVENTION

Appellant's claimed invention pertains to a method of and system for stopping and extinguishing forest fires, and involves the erection of a fire wall. Claim 1, reproduced below, is representative of the subject matter on appeal.

1. A method of stopping and extinguishing forest fires, comprising the steps of erecting at least one substantially vertical wall; making the wall of a fabric fire-resistant material by unrolling said roll fire resistant material from a roll so as to erect said wall and configured so that when a forest fire reaches the wall it can be stopped and extinguished, supporting said at least one wall on a plurality of supports extending over a whole height of said at least one wall.

THE REJECTIONS

The following Examiner's rejections are before us for review:

1. Claims 1, 2, 4, 7, 9, 10, and 14 are rejected under 35 U.S.C. § 102(b) as being anticipated by Farley (US 5,944,114, issued Aug. 31, 1999); and
2. Claims 8 and 15 are rejected under 35 U.S.C. § 103(a) as being unpatentable over Farley.

OPINION

The claims on appeal include method claims (independent claim 1 and dependent claims 2, 4, 7, and 8) as well as system claims (independent claim 9 and dependent claims 10, 14, and 15) that recite the same or similar structural elements utilized in or erected via the corresponding method. Method claim 4 does not have a corresponding system claim. Appellant argues the rejected claims (with the exception of claim 4) in pairs, grouping the method claim with the corresponding system claim. Br. 9-13. For each group, we select the method claim as the representative claim, and the corresponding system claim stands or falls with that method claim. *See* 37 C.F.R. § 41.37(c)(1)(vii). No separate arguments are presented for claim 4, and therefore it stands or falls with claim 1 from which it depends.

1. *The rejection of claims 1, 2, 4, 7, 9, 10, and 14 under 35 U.S.C. § 102(b) as being anticipated by Farley*

Claims 1 and 9

Appellant argues that “[t]his construction [of Farley’s device] is impossible to carry out” and that “[t]his construction can not be utilized in practice.” Br. 9, 10. We understand Appellant to argue that Farley would not have been enabling to one of ordinary skill in the art. However, the disclosures of a prior art reference are presumed to be enabled. *Amgen Inc. v. Hoechst Marion Roussel, Inc.*, 314 F.3d 1313, 1354 (Fed. Cir. 2003). Appellant bears the burden of showing non-enablement of Farley, but has not done so. *Id.* at 1355 (quoting *In re Sasse*, 629 F.2d 675, 681 (CCPA 1980)).

Appellant’s assertion that the rolled material of the invention is unwound vertically whereas Farley’s is pulled horizontal (Br. 10) does not

show error in the rejection because the assertion is not commensurate with the language of claims 1 and 9. While those claims recite a substantially vertical wall, the claims do not require unrolling in any particular direction to create that wall.

To the extent that Appellant's underlining of the word "fabric" in the statement pointing out what the claims recite constitutes an argument (Br. 10), that argument is not persuasive. The Examiner correctly found that Farley discloses a fabric fire-resistant material. Ans. 3; Farley, col. 7, ll. 15-18 (disclosing a sheet of fire-resistant material "composed of 2 mil aluminum bonded to glass cloth with fire resistant adhesive").

We therefore sustain the rejection of claim 1 as anticipated by Farley. Claims 4 and 9 fall with claim 1.

Claims 2 and 10

Appellant's arguments (Br. 11) that "Farley does not disclose any anti-fire cut-through paths" and the reference to forest roads are not commensurate with the language of claim 2, which does not require any such paths or roads. To the extent that Appellant argues that a claimed feature is missing from Farley, the Examiner's response regarding claims 2 and 10 adequately addresses that argument. Ans. 4. We sustain the rejection of claims 2 and 10 as anticipated by Farley.

Claims 7 and 14

Claim 7 calls for bringing vegetation behind the fire wall to the ground and applying anti-fire foam to the vegetation. Appellant argues that this is not disclosed in Farley. Br. 12. The Examiner maintains that "[o]nce the wall is erected, the fire can be extinguished by conventional means which includes bringing vegetation to the ground and applying anti-fire

foam onto the vegetation” and “once the wall of Farley is erected, the fire can be extinguished using anti-fire foam since the use of anti-fire foam is widely used in the fire fighting art, and Farley has already disclosed not just erecting to stop a fire but also extinguishing the fire” Ans. 3, 4-5.

While Farley does disclose that fires getting past the barrier “can be put out by conventional methods” (Farley, col. 3, ll. 3-5), the Examiner did not find that Farley specifically discloses bringing down vegetation and applying foam. As such, we cannot sustain the rejection of claims 7 and 14 under § 102.

However, the Examiner’s articulation of the rejection, including the fact findings and corresponding reasoning, is sufficient to establish a prima facie showing that Appellant’s claimed subject matter – both the method of claim 7 and the system of claim 14 – would have been obvious to one of ordinary skill in the art. Further, we note that erecting a fire wall as in the method of claim 1 and forming the trench for the fire wall as recited in claim 8 (discussed below) would tend to bring down vegetation (at least grass). We also note that Appellant admits that it was known in the art to apply anti-fire foam (Spec. 1) and does not dispute the Examiner’s finding that bringing down vegetation and applying such foam was a conventional means to extinguish a fire (Br. 12). Therefore, we enter a new ground of rejection of claims 7 and 14 under 35 U.S.C. § 103(a) as being unpatentable over Farley.

2. *The rejection of claims 8 and 15 under 35 U.S.C. § 103(a) as being unpatentable over Farley*

Dependent claim 8 recites a method comprising forming a trench and placing the wall in the trench. Appellant appears to contend that the

Examiner's conclusion of obviousness is flawed because Farley does not disclose placing the roll of fire-resistant material in the trench for vertically upwardly unrolling. Br. 13. Appellant's argument is not commensurate with the language of claim 8 (including the limitations of the claims from which it depends), which does not require the wall to be erected in the manner suggested by Appellant. As such, Appellant has not persuaded us of error in the Examiner's conclusion that the subject matter of claim 8 would have been obvious. Claim 15 falls with claim 8.

DECISION

The decision of the Examiner to reject claims 7 and 14 as anticipated by Farley is reversed. The decision of the Examiner to reject claims 1, 2, 4, 8-10, and 15 is affirmed. We enter a new ground of rejection of claims 7 and 14 under 35 U.S.C. § 103(a) as being unpatentable over Farley.

FINALITY OF THE DECISION

Regarding the affirmed rejection(s), 37 C.F.R. § 41.52(a)(1) provides "Appellant may file a single request for rehearing within two months of the date of the original decision of the Board." In addition to affirming the Examiner's rejections of one or more claims, this decision contains a new ground of rejection pursuant to 37 C.F.R. § 41.50(b). 37 C.F.R. § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 C.F.R. § 41.50(b) also provides that Appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution.* Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the Examiner, in which event the proceeding will be remanded to the Examiner. ...

(2) *Request rehearing.* Request that the proceeding be reheard under § 41.52 by the Board upon the same record.

Should Appellant elect to prosecute further before the Examiner pursuant to 37 C.F.R. § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the Examiner unless, as a mere incident to the limited prosecution, the affirmed rejections are overcome.

If Appellant elects prosecution before the Examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED-IN-PART; 37 C.F.R. § 41.50(b)

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